

The Indiana Prosecutor

November 2004

Published by the
Indiana Prosecuting Attorneys Council

BLAKELY ORAL ARGUMENTS HEARD

The day before oral arguments were to be heard in two Indiana cases challenging the constitutionality of sentences imposed after *Blakely v. Washington*, 124 S. Ct. 2531 (2004), the Indiana Supreme Court granted *amicus* status to the Indiana Prosecuting Attorneys Council. Council Executive Director Stephen J. Johnson had earlier filed an *amicus* brief in each of the cases upon which the Supreme Court was to hear oral argument.

In the first of these two cases Adolphe Smylie pled guilty in Johnson County to two counts of Class D felony child solicitation. Under the terms of Smylie's plea agreement, sentencing was left to the discretion of the court. Smylie had no criminal history. The judge sentenced Smylie to one and a half years on one count and two years on the other and ordered the sentences to run consecutively. The presumptive for each of the charged offenses was one and one-half years.

A Noble County jury found Bruce Heath guilty of Class D felony criminal recklessness after he injured two people when he fired a gun into a crowd of people. Once again, the presumptive sentence was one and one-half years, but Judge David Laur found that aggravating circumstances existed that justified enhancing Heath's sentence to two and one-half years.

At the oral argument on November 10, each side was given 40 minutes to argue. Deputy Attorney General Ellen Meilaender used about thirty minutes of the allotted time for her argument on behalf of the State. The remainder of the time was reserved for Johnson's argument on behalf of Indiana prosecutors.

The State's argument, waiver notwithstanding, focused on the merits of the claims by Smylie and Heath that their sentences, each of which was in excess of Indiana's presumptive statutory sentence, were unconstitutional under *Blakely*.

In *Blakely*, the United States Supreme Court, in a 5-4 decision, held that the State of Washington's sentencing system was unconstitutional. According to *Blakely*, the Sixth Amendment requires that juries, rather than judges, must find beyond a reasonable doubt any fact that a defendant does not concede when that fact is used to enhance the defendant's sentence beyond the "statutory maximum"

It is still not clear if or to what extent the *Blakely* decision will impact sentencing in Indiana. That is the question that the Supreme Court is being asked to answer in the cases upon which argument was heard. The State emphasized to the Court that Indiana's sentencing scheme is qualitatively different from the Washington scheme at issue in *Blakely* and that those differences remove Indiana from the scope of *Blakely's* coverage. Johnson and Meilaender argued that the statutory range of sentence in Indiana is equivalent to Washington's "standard range". As long as a sentence falls within that statutory range, *Blakely* is not implicated the State argued.

The Court gave no indication of when it would render its opinion on this important issue. The cases argued were taken under submission.



Paoli Peaks
Orange County, Indiana

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Recent Decisions Update

Indiana

• Limitation on Expert Testimony Approved

Schmidt v. State, 816 N.E.2d 925 (Ind. Ct. App. 10/28/04) Christopher Schmidt was convicted in Hamilton County of Operating a Vehicle While Intoxicated, a Class D Felony. One of the issues raised by the defense on appeal was whether the trial court had abused its discretion when it excluded certain expert witness testimony.

The defense proffered Dr. Daniel McCoy as a defense expert at trial. On the first day of trial the trial court granted portions of the State's Motion in Limine regarding particular testimony from McCoy. During his offer of proof, Schmidt explained that, given the opportunity, Dr. McCoy, a toxicologist, would testify that in light of various factors like Schmidt's height, weight, and the amount of alcohol he had consumed on the night before his arrest, Schmidt's blood alcohol content would have been below the legal limit. The trial court prohibited Dr. McCoy from giving an opinion based on information he had received from the defendant prior to trial when Schmidt had not testified and placed those facts into evidence. The defense argued that this was error.

Relying on Evidence Rule 703, Schmidt argued that Dr. McCoy's opinions were admissible under that rule because McCoy's expert testimony would have been based on inadmissible facts that are "of the type reasonably relied upon by experts in the field." The trial court held that statements by a defendant did not fall within the purview of the types of information or data contemplated by Rule 703 and granted the State's Motion in Limine. The Court of Appeals agreed with the trial court.

Dr. McCoy's opinion regarding Schmidt's level of intoxication was based on facts that Schmidt had told him before trial. In other words, the Court said, statements by the defendant were the basis of Dr. McCoy's opinion. McCoy did not rely on records, data, reports, or other types of information our courts have generally found to be reasonably relied upon by experts in a particular field. Quoting Dr. Robert Miller's *Indiana Practice, Indiana Evidence* § 703.107, 427-30, the Court of Appeals concluded that "To allow Schmidt to present his version of events through Dr. McCoy's testimony would be 'a conduit for placing...another person's statement before the jury.'" The Court of Appeals concluded that the trial court had not abused its discretion when it excluded Dr. McCoy's testimony unless and until Schmidt testified.

• Court of Appeals Continues To Apply Blakely

As prosecutors await word for the state's highest court on the applicability of *Blakely v. Washington*, 542 U.S.____, 124 S.Ct. 2531 (2004), to Indiana's sentencing scheme, the Indiana Court of Appeals continues to publish opinions applying the holdings of *Blakely* in cases they have reviewed. Two examples follow.

- *Traylor v. State*, ____ N.E.2d ____, (Ind. Ct. App. 11/10/04) Jason Traylor was found guilty by a jury in Pike County of dealing (manufacturing) in methamphetamine over three grams, a Class A felony, possession of methamphetamine over three grams, a Class C felony, and visiting a common nuisance, a misdemeanor. The trial court sentenced Traylor to forty years on the Class A felony conviction, six years on the Class C felony and 180 days for the Class B misdemeanor. Those sentences were ordered to be served concurrently. Traylor appealed his conviction and sentences.

In 2000, the U.S. Supreme Court in *Apprendi v. New Jersey*, held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Earlier this year in deciding *Blakely v. Washington*, the Supreme Court attempted to clarify the "prescribed statutory maximum sentence" language of *Apprendi*. The Supreme Court in *Blakely* held that "the prescribed 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In *Traylor*, the Indiana Court of Appeals said that "after a jury returns a guilty verdict, the trial court can only impose the presumptive sentence, as outlined in the statute, without finding additional facts." "Therefore, the presumptive sentence for an offense is the prescribed statutory maximum for *Apprendi/Blakely* purposes, the *Traylor* Court said.

Because the aggravating circumstances upon which the trial court enhanced Traylor's sentences were not submitted to a jury and proved beyond a reasonable doubt, under *Apprendi* only the defendant's prior criminal convictions could be used by the trial court to enhance Traylor's sentences, the Court of Appeals concluded. And, in this case, in light of Traylor's limited criminal history - only one misdemeanor conviction in 1998 for battery - the aggravator was insufficient to enhance the defendant's sentence at all. Traylor's sentences for his Class A felony conviction and his Class C felony conviction were vacated and the cause was remanded for re-sentencing consistent with the opinion of the Court of Appeals.

Recent Decisions Update (continued)

- *Strong v. State*, ___ N.E. 2d ___ (Ind. Ct. App. 11/5/04)

In this appeal, Sean Strong challenged his sixty-year sentence for murder in light of *Apprendi* and *Blakely*. The State argued that *Blakely* does not apply to Indiana's sentencing procedure. The panel of the Court of Appeals that wrote this opinion did not agree.

Indiana's sentencing statute for murder provides, in relevant part, that a person who commits murder can be sentenced for "a fixed term of fifty-five years, with not more than ten years added for aggravating circumstances nor more than ten years subtracted for mitigating circumstances." I.C. 35-50-2-3. Thus, the Court said "the prescribed or 'statutory maximum' sentence for murder, which the trial court may impose without any additional findings is fifty-five years and the penalty range for murder, notwithstanding a term of death, is between forty-five and sixty-five years."

In imposing Strong's sixty year sentence the trial court found two mitigating circumstances - the defendant's limited criminal history and that he had no adult felony convictions. The trial court also found two aggravating circumstances. The Court of Appeals accepted as aggravating factors that the victim was shot in his own home and that the fatal shooting was unprovoked. In that the jury did not find these aggravating circumstances beyond a reasonable doubt, an enhanced punishment was not permitted, the Court of Appeals held. The sixty-year sentence imposed in this case violated the Sixth Amendment right of the defendant under *Blakely*, the Court held. The case was remanded for a new sentencing order.